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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 196.

AARON L. BILTCHIK and FLORENCE W. BEILL, Individually and as Holders of Class B Debentures of Green Bay and Western Railroad Company, Suing on Behalf of Themselves and All Other Holders of Said Debentures Who May Be Similarly Situated,

Petitioners,

vs.

GREEN BAY & WESTERN RAILROAD COMPANY, a Wisconsin Corporation, and C. LEDYARD BLAIR, CHARLES W. COX, ROBERT WINTHROP, H. E. McGEE and RICHARD B. WILSON,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Replying to Respondents' Statement of the Case.

Respondents erroneously state that this action was brought by petitioners to seek an interpretation under Wisconsin law of the language of the Class B Debentures. Petitioners, residents of New York (R., p. 11), sued in Wisconsin to recover the amounts due in lieu of interest on the Class B Debentures of defendant interstate railroad corporation. The Debentures expressly provide that the amounts payable thereon will be paid at the office or agency of the company in the City of New York, that they shall pass by delivery unless registered on the books of

the company at its office or agency in the City of New York, and that the Debentures shall not be valid for any purpose unless authenticated by the signature of the Farmers Loan and Trust Company (R., p. 16), a New York banking corporation. On familiar and elementary principles the Debentures are therefore governed by the laws of New York.

The B Debentures are registered with the Securities and Exchange Commission and listed on the New York Stock Exchange (Exhibits 5 and 6; R., pp. 54, 58); they are owned and held by a large number of persons and are frequently bought and sold on the security markets, and the question in the action is one of common or general interest to all owners of such Debentures (Finding of Fact 15; R., p. 8).

The New York plaintiffs brought suit in defendant's home state of Wisconsin to avoid unnecessary litigation of questions of jurisdiction and of *forum non-conveniens*.

See:

Sperling v. *McGee*, 268 App. Div. 925, 51 N. Y. Supp. 2nd 274;

Cf. *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549.

In this action on bonds payable in New York, the Wisconsin courts have given judgment *on the merits* against the New York plaintiffs (R., pp. 5, 10, 185), because they found that defendant is an inter-state common carrier operating railroad lines in Wisconsin and Minnesota and that all of its income, other than the sums allocated and paid to the security holders, was used and necessarily used in the public interest for additions and betterments to defendant's railroad

and to properly and adequately serve the public, to meet competition and in the best interest of the security holders. The Wisconsin courts thus sustained the Fifth Defense in which defendants raised federal questions (R., pp. 19-20; Findings of Fact 1, 4, 12; R., pp. 6, 8).

The amounts sued for, which are promised to the bondholders in lieu of interest by the terms of the Debentures, are the surplus earnings of the railroad as shown in its reports to the Interstate Commerce Commission, after substantial deductions for maintenance, depreciation and reserves for betterments and after provision for payment of five percent on the par value of the A Debentures and stock (R., pp. 22-30; Exhibits 9, 10, 11, 12, 14, 15; R., pp. 138, 139, 161, 164, 192, 234).

During the past twenty years, the average return of the B Debenture holders has been a little over one-half of one-percent per annum. If they recover herein, their average return will be brought up to about one percent per annum (R., p. 42).

Replying to Respondents' Point I.

In view of their Fifth Defense (R., pp. 19-20) and their argument in their brief in the Supreme Court of Wisconsin (quoted at page 18 of our Brief in Support of Petition for Certiorari herein) respondents cannot very well contend that no federal question was *presented* below.

Respondents contend, however, that the *decision* below involves no federal question, or that it rested on both a non-federal question and a federal question and that it does not appear upon which ground the

judgment was based (B and C of Respondents' Point I).

We submit however that the judgment below as rendered could not have been given without deciding the federal questions in favor of defendants, and that the judgment cannot be supported by any independent and adequate non-federal ground.

In form, the Wisconsin courts construed the B Debentures. In substance and effect, they held that the B Debenture holders cannot recover the money expressly promised them by the Debentures in lieu of interest, because defendant is an interstate railroad company and it needed and used the money for the betterment and improvement of its railroad "in competition with other railroads of the same class" and "in the public interest" (R., pp. 4, 189). The Wisconsin Supreme Court emphasized that "The defendant is a railroad corporation and as such it is the duty of its directors to keep it in proper operation and to pay the expenses of such operation and of maintaining its physical property in condition requisite for such operation * * *" (R., p. 189).

Defendant proved that it is an inter-state common carrier in competition with other inter-state railroads and that most of its business consists of through interstate traffic (R., p. 31),* and also submitted evidence in support of its contention that the money sued for was used by it "in the public interest" for betterments and improvements of its railroad to enable it to compete in interstate commerce (R., pp. 30-52). The court

* The Fifth Defense erroneously states that defendant owns and operates lines of railroad entirely within the State of Wisconsin (R., p. 19). This same erroneous impression was apparently conveyed to this Court in *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549, at pages 559-560.

found in accordance with defendants' contentions in these respects (Findings of Fact 1, 4 and 12; R., pp. 6, 8).

This evidence and these findings were material only to the Fifth Defense. Plaintiffs were suing on an absolute contract to pay money. No claim of abuse of discretion was pleaded by plaintiffs, nor was any such issue tendered or litigated by plaintiffs (R., pp. 10, 183).

Finding 12 (R., p. 8), stressed in Respondents' brief herein, obviously deals only with Federal questions. See Interstate Commerce Act, 49 U. S. C. A., Section 1.

Moreover, the constitutional question was presented and necessarily decided as to whether the alleged necessity of this corporation to use the money for betterments and improvements of its interstate railroad running through Wisconsin and Minnesota so as to comply with the claimed "laws, statutes and public policy" of Wisconsin and of the United States, could excuse it from performing the terms of its contract authenticated in New York to pay that money in New York to New York residents (R., pp. 183-184).

The Wisconsin Supreme Court also "bore in mind" what it considered to be the "scheme of reorganization" in the United States Circuit Court for the Eastern District of Wisconsin in 1896, as a part of which the B Debentures were issued (R., p. 187). That can hardly be said to be a non-federal ground; certainly it is not an independent non-federal ground of sufficient breadth to sustain the judgment without decision of a federal question.

Any non-federal grounds which may have entered into the "construction" of the Debentures are mingled with the federal questions and are not independent,

substantial or sufficient to support the judgment. In the absence of an independent, adequate non-federal ground, this Court should take jurisdiction.

See:

State Tax Commission v. *Van Cott,* 306 U. S. 511, at p. 514;
Abie State Bank v. *Bryan,* 282 U. S. 765, at p. 773;
Williams v. *Kaiser,* 323 U. S. 471, at pp. 477-478;
10 Cyclopedia of Federal Procedure, Sec. 4992-3, pp. 439, 450.

It cannot be doubted on this record that if these had been the debentures of a purely local company engaged in a business not affected with a public use, the Wisconsin Courts would have "construed" them according to their tenor, as containing an absolute, not a discretionary, obligation to pay, as they were correctly construed by Judge Jerome Frank in his dissenting opinion in *Williams* v. *Green Bay & Western R. Co.,* 147 Fed. 2d 777, *reversed* 326 U. S. 549.

This Court is not limited to a mere consideration of the language used in the state court opinion but may examine and determine the real substance and effect of the decision.

See:

McCullough v. *Virginia,* 172 U. S. 102;
Louisiana R. & N. Co. v. *Behrman,* 235 U. S. 164, 170-171.

It is necessary for this Court "to examine the record in order to determine whether the judgment of the state court is based upon a non-federal ground adequate to sustain it." *Patterson* v. *Alabama,* 294 U. S. 600, 602.

See also:

Ward v. *Love County,* 253 U. S. 17, 22-23.

In the caption to subdivision C of their Point I, respondents omit the very important element of the rule in *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, that "the ground independent of a federal question is sufficient in itself to sustain it."

Fox Film Corp. v. *Muller,* 296 U. S. 207, is clearly distinguishable. There the decision rested on an independent and sufficient non-federal ground, and the case was in effect disposed of before the federal question was reached.

In *Honeyman* v. *Hanan,* 300 U. S. 14, it was held that this Court will examine the record—not merely the decision of the State Court—and determine for itself whether a federal question is involved.

Furthermore, this case arises from what are in fact interstate transactions. It involves the rights of security holders in relation to nationally distributed securities listed with the Securities and Exchange Commission and traded on national stock exchanges. Such securities are now regulated by the Interstate Commerce Commission and the Securities and Exchange Commission. See the dissenting opinion of Mr. Justice Rutledge in *Guaranty Trust Co.* v. *York,*

326 U. S. 99, at pp. 117-118; Interstate Commerce Act, 49 U. S. C. A., Section 20a.

Replying to Respondents' Point II.

Of the six decisions cited by respondents, two are the decisions of the Wisconsin Courts in this case, which petitioners now seek to review. The other four are decisions of *Federal courts.*

Williams v. *Green Bay & Western Railroad Company* (CCA 2nd), 147 Fed. 2nd 777, was *reversed* by this Court in 326 U. S. 549, and the construction of the covenant sued on herein was expressly left open. We respectfully submit that the dissenting opinion of Circuit Judge Frank in that case correctly construes the Debentures.

Williams v. *Green Bay & Western Railroad Company* (U. S. D. C. So. D. N. Y.), 68 Fed. Supp. 509, followed the decision of the Wisconsin Supreme Court in the instant case. Respondents are trying to lift themselves by their own bootstraps in citing it to support the very decision on which it rests.

Green Bay and Western Railroad Company v. *Commissioner of Internal Revenue,* 3 T. C. 372, 147 Fed. 2nd 585 (CCA 7th), was a tax case. Present counsel for the railroad at first argued in their brief in that case that the Debentures gave the directors no discretion, but in their *reply brief* in the Circuit Court of Appeals, filed after the commencement of the litigation on behalf of the B Debenture holders, they changed their position and conceded the government's contention that the directors had discretion. That

issue was thus not contested before the Circuit Court of Appeals. Although a substantial tax liability of the railroad resulted from that decision, no application was made to this Court for certiorari to review it.

CONCLUSION.

The petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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